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Marlene H. Dortch
Federal Communications Commission
Office of the Secretary
445 12th Street, SW
Washington, DC 20554

Federal Communications Commission
Office of Secretary

Re: KTVQ(TV), Billings, Montana (Facility ID Number 35694)
KPAX-TV, Missoula, Montana (Facility ID Number 35455)
KRTV(TV), Great Falls, Montana (Facility ID Number 35567)
KXLF-TV, Butte, Montana (Facility ID Number 35959)
KBZK(TV), Bozeman, Montana (Facility ID Number 33756)
Contingent Request for Waiver of Closed-Captioning Requirements

Dear Ms. Dortch:

KTVQ, on behalf of Cordillera Communications, Inc. ("Cordillera"), the direct corporate parent of the licensees of the above-referenced television stations (the "Stations"), hereby requests clarification of the Commission's closed-captioning requirements. Cordillera believes that the locally produced portions of the Stations' upcoming broadcasts of the Muscular Dystrophy Association (MDA) Telethon ("telethon") fall within the exception to the closed-captioning requirements set forth in 47 C.F.R. § 79.1(d)(8). In the alternative, however, Cordillera hereby submits, in triplicate and pursuant to 47 C.F.R. § 79.1(f), a request for limited temporary relief from the closed-captioning requirements. As demonstrated herein, the requested waiver would avoid placing an undue burden on the Stations.

The Montana Local Service Area. The Stations collectively serve most of the state of Montana, which Nielsen has divided into several DMAs. These DMAs are among the nation's smallest DMAs in terms of population, while also among the nation's largest DMAs geographically:

- KTVQ serves Billings, ranked DMA 171;
- KPAX serves Missoula, ranked DMA 168;
- KRTV serves Great Falls, ranked DMA 189; and
- KXLF and KBZK serve Butte-Bozeman, ranked DMA 193.

The Stations therefore serve a very small number of people spread out over a vast geographic expanse. For example, the Great Falls DMA includes counties that total 104,366 square kilometers in size and contain 64,130 TV homes.¹ The Great Falls DMA itself is *more than 25% larger*

¹ See TELEVISION & CABLE FACTBOOK 2006, vols. 1-2 (Warren Communications News ed., 2006); 2002 COUNTY AND CITY EXTRA: ANNUAL METRO, CITY, AND COUNTY DATA BOOK (Deirdre A. Gauquin & Katherine A. DeBrandt eds., 11th ed. 2002); Nielsen Media Research Local Market Universe Estimates, available at www.nielsenmedia.com.

geographically than the New York, Chicago, and Philadelphia DMAs *combined* (a total of 73,058 square kilometers). Despite their smaller collective size, these three urban DMAs serve a total of 13,731,880 television households, or more than 214 times the number of such homes in the rural Great Falls DMA.²

The Cordillera Stations face the largely same operational costs as stations that serve populous urban markets. Because these Montana stations do not enjoy the benefit of big-market revenues, their relative costs are extremely high. The only efficient way for rural television stations like these to provide local, public interest programming for their viewers is to network their facilities, share content, and allocate costs among the stations.

Accordingly, Cordillera's Montana stations – all CBS affiliates – have created a sophisticated network that permits them to share programming resources and content. Through this network, the rural populations within each Montana DMA receive high quality and in-depth news, weather, and emergency information that simply would not be available to these Stations' viewers otherwise. Cordillera's plan for the local portions of the telethon follows this model of sharing high-quality, locally produced programming content among the Stations.

The Telethon. MDA is a charitable organization dedicated to researching and curing neuromuscular diseases. Its annual telethon is a television tradition and will celebrate its fortieth anniversary this year. Last year's telethon raised a record \$60.5 million for muscular dystrophy research. This year's telethon will run from 7 p.m. to midnight on September 3, 2006, and from midnight to 5:30 p.m. on September 4, 2006.

As part of its support this worthwhile cause, KTVQ will produce local "cut-ins" between fifteen and thirty minutes long each that will appear between the national portions of the telethon. The local spots will be produced by KTVQ in Billings and will be networked to the other Stations for broadcast during the local cut-in time periods. The Stations are donating the air time to broadcast this event, as well as other additional expenses. As the Stations forgo revenue from air time they could otherwise sell and expend other funds to produce the local spots, the additional expense of closed-captioning constitutes an undue burden and strains the ability of stations serving small populations in rural markets to produce local public interest programming as well as the resources of the local charity that would bear some or all of the captioning expenses.

Closed-Captioning Requirements. Under the Commission's closed captioning rules, the Stations generally must provide closed-captioning for all new English language programming. Several categories of programming are exempt from this requirement, however, such as late-night programming; short, interstitial promotional or public service announcements; and programming in languages other than English or Spanish. The Commission also recognizes that requiring closed-captioning for local, public interest, non-news programming may be burdensome and accordingly provides a limited exception from the closed-captioning rules to accommodate such situations (the "public interest exception").³ Under this exception, programming is exempt from the closed-captioning requirements if it is

² *Id.*

³ 47 C.F.R. § 79.1(d)(8) (2005).

locally produced by the video programming distributor, has no repeat value, is of local public interest, is not news programming, and [if] the 'electronic news room' technique of captioning is unavailable.⁴

We believe our local telethon cut-ins qualify for this exception. The live cut-ins will be produced by KTVQ in Billings and will have no repeat value as they will serve only to supplement this year's two-day telethon. The cut-ins will be specifically designed to provide a local perspective on the need for muscular dystrophy research and treatment as a complement to the national portions of the telethon and will not be news programming. The local cut-ins will be live, extemporaneous broadcasts not suitable for the electronic news room captioning technique.

The Commission's Closed Captioning Report and Order ("Order") further instructs that to qualify for this exemption, the programming must not be networked outside of the "local service area."⁵ The Order is not clear whether a "local service area" is strictly defined by DMA or if other demographic considerations affect this determination. In the New York City DMA, for example, there may be several local service areas within a single DMA. In Montana, and other large, rural states, the obverse is true – there may be one local service area that spans several DMAs in certain circumstances.

In the present case, we submit that the entire state of Montana is one local service area. As explained above, the Stations routinely share programming resources and content to provide Montana residents with more in-depth, more timely, and more relevant news, weather, and public affairs programming than otherwise would be possible without the sharing arrangements. Providing local cut-ins for the telethon through the same system enables all of the Stations to provide a local character to the telethons in a manner that benefits the telethon and its beneficiaries. In this manner, the public interest exception, which already exempts local cut-ins aired by stations in urban markets, provides equivalent relief to stations such as Cordillera's that serve vast and predominantly rural areas.

Request for Waiver. While Cordillera believes that the telethon local cut-ins satisfy the public interest exception, out of an abundance of caution, Cordillera hereby requests a waiver of the closed-captioning requirements for the KTVQ-produced portions of the telethon that will air on September 3-4, 2006. We believe that the cut-ins meet the spirit, if not the letter, of the public interest exception. A waiver in this case would allow stations serving scattered rural populations to produce programming in the same manner as stations in populous urban markets.

The Commission is obligated to consider waiver requests pleaded with particularity and clarity.⁶ This request meets that standard and clearly explains why the Commission should extend the public interest exception to include this situation, given the unique challenges presented by the geography and population of Montana. That KTVQ does not meet the letter of the rule is not fatal to its request. "The very essence of waiver is the assumed validity of the general rule, and also the

⁴ *Id.*

⁵ Closed Captioning and Video Description of Video Programming, Report and Order, 13 FCC Rcd. 3272, 3347 (1997).

⁶ *WAIT Radio v. FCC*, 418 F.2d 1153, 1157 (D.C. Cir. 1969) (holding that agencies must give properly-pleaded waiver requests a "hard look").

applicant's violation unless waiver is granted."⁷ A waiver is a "limited safety valve"⁸ that will reinforce the Commission's original policy toward this type of programming and also acknowledge that a set of general rules cannot contemplate every situation that might merit exemption from the closed-captioning requirement. Indeed, the Commission needs to enforce rules but also consider waivers in order to "maintain the fundamentals of principled regulation without sacrifice of administrative flexibility and feasibility."⁹

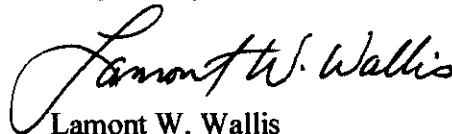
The Stations *must* network the local portions of the telethon to share costs. The cut-ins serve the public interest in the face of economic hardship – the hallmark of the public interest exception. The type of programming the Commission intended to fall under the exemption "is produced on a very low budget basis, is not remunerative in itself, [and] is presented essentially as a 'public service.'"¹⁰ The public interest exception encourages such programming by reducing costs for the stations. If the Stations do not share the cut-ins among themselves, however, producing the segments would go from costly to cost-prohibitive. Moreover, while Cordillera easily could fit these cut-ins into another exception available under the Commission's rules, that is, by limiting the cut-ins to five minutes, Cordillera believes that reducing the cut-ins in this manner would not serve the public interest.

The Commission intended to encourage non-news, non-remunerative, public service programming produced on a reduced budget by exempting it from the closed-captioning requirements. The telethon cut-ins are still fundamentally local in that they are produced by Cordillera in Montana rather than by a third party in New York or Los Angeles or Washington. They also provide a public service to viewers without monetary gain to the Stations. Cordillera recognizes the importance that the MDA Telethon has to the Stations' communities and seeks to enhance the value of the telethon by adding a local component highlighting these issues in the Montana community. The instant waiver would merely place rural and urban stations on equal footing by allowing the Stations to provide their viewers with quality local public interest programming comparable to that offered by television stations serving urban markets that are vastly smaller geographically yet hundreds of times more populous.

The telethon will run from 7 p.m. to midnight on September 3, 2006, and from midnight to 5:30 p.m. on September 4, 2006. If the Commission does not act on this request by September 5, 2006, please consider it withdrawn. If the Commission needs any further information concerning this request, please contact me.

Thank you for your consideration of this request.

Respectfully submitted,



Lamont W. Wallis
President

⁷ *Id.* at 1158.

⁸ *Id.* at 1159.

⁹ *Id.*

¹⁰ *Id.*